

Gill (Migration) [2023] AATA 3966 (11 April 2023)

- 1.
- 2.

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mrs Jaspreet Kaur Gill Master Guntaas Singh Sandhu Mr Jagjit Singh
REPRESENTATIVE:	Ms Vanessa De Pretis (MARN: 1388116)
CASE NUMBER:	1925200
HOME AFFAIRS REFERENCE(S):	BCC2017/1378849
MEMBER:	Wan Shum
DATE:	11 April 2023
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicants Skilled (Residence) (Class VB) visas.

Statement made on 11 April 2023 at 4:28pm

CATCHWORDS

MIGRATION – Skilled (Residence) (Class VB) visa – Subclass 887 (Skilled - Regional) – false or misleading information – evidence of functional English – education qualification – payment of the visa application charge (VAC) – bogus document – school letter – waiver of requirement – employment in the aged care industry – decision under review affirmed

3.

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), Schedule 2, cls 887.223, 887.225; Schedule 4, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 4 September 2019 to refuse to grant the applicants Skilled (Residence) (Class VB) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
5. The applicants applied for the visas on 13 April 2017. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl 887.225(a) of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because the second named applicant did not satisfy Public Interest Criterion 4020.
6. The applicants sought review of that decision and were represented in relation to the review.
7. The applicants appeared before the Tribunal by videoconference using Microsoft Teams on 23 February 2023 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Gill, the first named applicant's brother.
8. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in this review is whether the visa applicants meet Public Interest Criterion 4020 (PIC 4020). Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
10. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

11. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
12. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
13. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
14. However, whilst PIC 4020 implies the need for 'probative evidence', PIC 4020 only requires evidence that a bogus document has been submitted, not that a document that has been submitted is bogus. Therefore, if a document which is found to be bogus under the 'relatively undemanding test' of 'reasonable suspicion' has been submitted in connection with a visa application, no more is needed to show that there is 'evidence' of the sort referred to in PIC 4020(1).
15. It was submitted to the Tribunal that the first named applicant steadfastly attests to the fact that she has not personally provided bogus documents or false or misleading information to the Department and she had no intention to do so. It was submitted that she is a victim of fraud and deceit by her previous migration agent who provided the said falsified document in question to the Department of Home Affairs, without any authority to do so and abusing the confidence entrusted to her by the first named applicant and her family.
16. The relevant details of the events that led to the provision of the 'falsified document' have been summarised below.
17. On 17 August 2017 the applicants' then representative, Sanjay Gundhi, provided the Department with a number of documents in response to a request for more information which had been made by the Department on 21 July 2017 and stated: "Applicant claims to have paid the Secondary VAC towards fulfilling the Secondary Applicant's English Language requirement at the time of the sc489 visa application/grant. She somehow cannot find any proof or receipt of the same. Applicant requests your kind office to please check through your internal system of the same and advise".
18. On 13 September 2017, the Department again requested evidence of functional English for the second named applicant, advising there was no evidence the applicant had paid the relevant visa application charge (VAC) "at the first stage". The "first stage" appears to be a reference to the Subclass 489 visa. The applicants were asked to provide proof of his having "Functional English" and advised that they could demonstrate that he had functional English by providing evidence that he satisfied one of the language tests or education qualifications which were listed in the attachment. In response to the request, their representative at the

time forwarded a letter, that the first named applicant confirms that she had provided to him, purportedly issued by Kandighar Senior Secondary School which relevantly stated that Mr Singh had attended the school as a “regular student” and that “[h]e completed this program of study on regular basis (primary education – from 1st till 5th standard i.e. 5 years & Secondary education mean from 6th till 12th standard...”. Mr Singh gave evidence at the hearing that the information contained in the letter was not correct and that he had only undertaken Year 12 examinations at this school, it was an open school and he did not attend classes. The submissions reflect, and the applicants propose, that the migration agent was negligent and at fault for passing it on to the Department – however, given that it was provided from the first named applicant, it seems to the Tribunal that Mr Gundhi had done so ostensibly on the instructions of their client. The first named applicant claims that “she had forwarded [the India-based agent’s] email to Sanjay to check it for me” but the evidence of that email simply shows that she had forwarded a copy of the fake letter from her email account to Sanjay Gundhi’s email address, so in the Tribunal’s view it does not support her own assertions of asking him to “check” the document.

19. The applicant maintains that it was not her mistake and that she was the victim having trusted an “agent” with their visa application. However, the Tribunal does not accept that the applicant is any less culpable for the reason she gives of having forwarded it to Mr Gundhi without checking the contents because the document was in English and she was busy at work. There is nothing to suggest that Mr Gundhi knew that the document contained false information. The only persons who would know this is the India-based agent and the applicants themselves. It does not seem to the Tribunal, as submitted, to be properly described as negligent of the agent (Mr Gundhi) since the document was given to him by the first named applicant in response to a request for evidence of functional English from the Department. The department’s request included an attachment entitled “Request for information – Detailed information” which outlined the manner in which functional English can be demonstrated, and specifically included a section on how to prove the applicant had functional English using education qualifications. A document purporting to satisfy the education qualifications was given to Mr Gundhi by the first named applicant and there is no evidence that Mr Gundhi had any knowledge that the document was not properly issued in respect of the second named applicant. It seems to the Tribunal that the first named applicant in claiming that she did not read the letter is also denying any responsibility in having given this letter to the agent in the first place.
20. In respect of their claims as to the circumstances leading up to the provision of the false letter, there are gaps in the evidence supporting their version of events as it is claimed that the communications with the India based agent were primarily over phone calls. They have provided some evidence that supports a conclusion that they had elected to pay the EEC when making the Subclass 489 visa application, specifically bank account statements reflecting that a transfer of money equating to the EEC was made to the India-based agent. They also claim that the email sent to the Department with a copy of the fake letter for the purposes of showing that the second named applicant has functional English was not sent by the applicant, and the email address used to correspond with the Department was not the applicant’s. This was all done in respect of the Subclass 489 visa application and, even were the Tribunal to accept that the applicants were not aware that a fake letter had been provided at that point, the Tribunal considers that they would have been aware that the letter regarding the second named applicant’s schooling that was given for the Subclass 887 visa application lodged in April 2017 was a fake document. In respect of this application, the applicant admits that she has, in response to a request for evidence of functional English or payment of the visa application charge (VAC), forwarded a document allegedly provided from the India based agent which contains false information to her then migration agent Mr Gundhi, who they had appointed to assist them with the Subclass 887 visa application. Instead of taking steps at this point to confront the India-based agent about the fake statements in the letter, the applicants have perpetuated the problem by providing that

document to Mr Gundhi claiming that they only came to know of this when the Department invited them to comment on the outcome of a verification check done with the school. The Tribunal has serious doubts that the applicant would have provided a document to her migration agent without checking its contents.

21. In any case, while much of the submissions refer to the fraudulent activity of the India-based agent and Mr Gundhi's perceived failures, for the requirements in PIC 4020(1) and (2) to be engaged, it is not necessary to show knowing complicity by the visa applicant. The words 'given or caused to be given' do not import a mental element such that an applicant needs to know that the documents or information they are providing are defective in the relevant sense. This means that all that is necessary is that the information provided was purposefully false. There is no dispute that the information contained in the letter is false, with the applicants acknowledging that the information is not true. Given this, the Tribunal finds that the letter dated 5 January 2015 purportedly issued by Kalgidhar Senior Secondary School in respect of the second named applicant was a bogus document as the Tribunal reasonably suspects it is a document that purports to have been, but was not, issued in respect of the second named applicant. The document was provided to the Department by their then agent in response to the Department advising that there was no evidence of payment of the VAC and asking for evidence of payment or alternative evidence of the second named applicant's functional English. In the Tribunal's view, the document would have appeared to address the very matter that remained outstanding. Even where they claim that the Indian based agent provided the document, as the applicants would have known the information contained in the document was false, the Tribunal considers that it is appropriate that they should bear the consequences for the provision of the document to the Department in spite of their view that Mr Gundhi was to blame for forwarding it to the Department.
22. Having considered the evidence provided of the events, the Tribunal finds in the circumstances that a bogus document was caused to be given by the applicants as they had appointed an agent, Mr Sanjay Gundhi, to assist with lodgement of the Subclass 887 visa application.
23. The Tribunal finds that there is evidence that the applicant has given, or caused to be given, to the Minister, a bogus document in relation to the application for the visa and, therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) be waived?

24. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
25. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
26. While not binding, the Tribunal may have regard to the department's interpretation and examples of what may constitute compelling or compassionate circumstances.

27. According to the Explanatory Statement it was intended that the granting of the waiver would relate solely to compelling circumstances affecting Australia's interests, or the compassionate and compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, not the interests of the visa applicant. The types of circumstances that may involve compelling or compassionate reasons for waiving the requirements of PIC 4020 identified in the Explanatory Statement include:
- family reasons (for example, unexpected serious or fatal family situations over which the applicant had no control, such as the incapacitation or death of a partner or child or another member of the family unit);
 - that family members in Australia would be left without financial or emotional support; and
 - a parent in Australia would be separated from their child (for example, if the child was removed with their non-resident parent and would therefore be subject to an exclusion period.
28. In addition, the Departmental policy suggests that there may be compelling circumstances affecting the interests of Australia if:
- Australia's trade or business opportunities would be adversely affected were the person not granted the visa (noting that gaining employer sponsorship is not considered sufficient grounds for a waiver); or
 - Australia's relationship with a foreign government would be damaged were the person not granted the visa; or
 - Australia would miss out on a significant benefit that the person could contribute to Australia's business, economic, cultural or other development (for example, a special skill that is highly sought after in Australia) if the person was not granted the visa.
29. The policy states that compelling circumstances affecting the interests of Australia would not include circumstances where the non-citizen merely claims that, if granted the visa, they would work and pay taxes in Australia, pay fees to an education provider or spend money in Australia.
30. It is submitted that there are compassionate and compelling reasons affecting Australian citizens and permanent residents to waive the PIC 4020 requirements and justify the grant of the visa. In addressing the waiver, the submissions focus on the first named applicant's employment and her study. The information before the Tribunal is that the first named applicant is employed as a "Hospitality Assistant" at Eldercare Acacia Court Nursing Home in Hendon South Australia. The Tribunal has before it an updated reference letter dated 16 February 2023 from the Site Operations Manager which relevantly states that the applicant has been employed in her position since 1 July 2018 and is contracted to 36 hours per fortnight providing hospitality services within their Aged Care Facility (RACS ID 6187). In the letter, the first named applicant is described as a highly skilled and experienced hospitality worker and how difficult it is to find skilled staff and the Tribunal accepts that she is a valued employee. The applicant also provided evidence that she is currently studying to become an enrolled nurse, having commenced a Diploma of Nursing at Southern Cross University on 14 October 2021, which has a course completion date of 27 April 2023. The Site Operations Manager indicates in her updated letter that the applicant will be offered a position with Eldercare as an enrolled nurse upon completion of her studies.

31. It is submitted that the service the first named applicant provides to ageing Australians and permanent residents is “indispensable to the aged care industry” and that throughout the COVID-19 Pandemic, she was classified as an essential worker. It was further submitted that her contributions as a hospitality assistant in the aged care sector are more crucial than ever due to the shortage of workers in the industry. The submissions are accompanied by several letters from current and former managers and work colleagues which reflect that the applicant is highly regarded in the workplace as well as copies of online articles from May, July and December 2022 highlighting the nursing shortage in hospitals across Australia and an article from February 2023 regarding a report highlighting that the aged care staffing shortage in Australia is set to deepen in 2025. The earlier responses to the Department’s natural justice letters also refer to the second named applicant’s employment as a taxi driver.
32. The Tribunal has had regard to the submissions, evidence and supporting material. While the Tribunal appreciates that the applicant provides an important service to aged persons living at the nursing home operated by Eldercare, it does not consider that she possesses a special skill which would amount to compelling circumstances that affect the interests of Australia that justify the grant of the visa. As outlined above, such circumstances would usually involve a significant contribution which is objective in nature and be in the public interest in Australia. The Tribunal does not consider that the evidence presented reflects that the applicant’s contribution as a hospitality assistant, and possible future nurse, are compelling circumstances that affect the interests of Australia.
33. In relation to PIC 4020(4)(b), it was submitted that the Tribunal acknowledges that some of the aged persons that the applicant is involved in providing services to at Eldercare would likely be Australian citizens or permanent residents, and possibly even eligible New Zealand citizens, although none of the aged care residents have provided any letters or comments regarding the applicant and her services. While the applicant not being granted the visa would likely have an impact on the employer, who would need to replace the applicant, the Tribunal does not consider that the necessary connection to an Australian citizen or permanent resident, or eligible New Zealand citizen, has been adequately demonstrated in terms of the direct impact on such a person if the waiver was not exercised in this case. There does not appear to be a direct connection between the visa not being granted to the applicants and an Australian citizen or permanent resident, or eligible New Zealand citizen, being unable to access necessary services, with the evidence relied upon referring to a general nursing shortage. Although it is clear to the Tribunal that the applicant is a highly valued employee based on the numerous reference letters from current and former colleagues, having regard to all the information before it, the Tribunal does not consider that the circumstances are compassionate or compelling that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen that justify the grant of the visa.
34. Given the above findings, the Tribunal is not satisfied that the requirements of PIC 4020(1) should be waived.
35. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl 887.223. The Tribunal notes however that 3 years have passed since the delegate’s decision was made in respect of PIC 4020 which may alter the impact of this decision on the applicants if it had been made earlier.

DECISION

36. The Tribunal affirms the decision not to grant the applicants Skilled (Residence) (Class VB) visas.

Wan Shum
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...